

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED
MAR 12 1997
FCC MAIL ROOM

In the Matter of

Closed Captioning and Video Description of
Video Programming

MM Docket No 95-176

ADDITIONAL COMMENTS OF MEDIA CAPTIONING SERVICES

Richard Pettinato
Patricia Ferrier

March 12, 1997

Media Captioning Services
2141 Palomar Airport Rd., Ste 310
Carlsbad, CA. 92009.

No. of Copies rec'd
List ABCDE

045

In our comments submitted February 24, 1997, we urged the FCC to include, in your administrative regulations, specific requirements for video programmers to use small business providers to meet their closed captioning requirements. We are submitting evidence of a current development which clearly illustrates the need for strong FCC administrative regulations to ensure small business caption providers are used by larger video programmers in meeting the FCC's closed captioning transition requirements.

The Department of Education is currently in the process of soliciting applications for its Closed Captioned Sports Programming Award. Over the past three months Media Captioning has repeatedly attempted to contact, and to obtain a response from ESPN on a bid proposal to seek federal funding to caption their programming. MCS's proposal to ESPN would have enabled them to use MCS to provide over 62% of the captioning on their network required prospectively by the FCC, by August 1997. In order to meet the grant guidelines of the Department of Education for private sector match, we provided ESPN a bid proposal which contained pricing which was, based on our knowledge of industry pricing, among, if not the lowest they had received. Our quality was not stated to be an issue by ESPN, and we have substantial operating experience- over 8,000 hours over the past 6 years in sports closed captioning. We are investigating the possibility that ESPN may have discriminated against our company. The sequence of events have raised the specter of discrimination against our company. Instead of being responsive to a proposal from MCS which could have substantially increased their overall captioning, maximizing federal dollars spent on

closed captioning, ESPN has chosen to use one contractor, a large nonprofit with a dominant market position, as their sole, primary caption provider. The FCC should be aware of video programmers who do not avail themselves of small woman and or minority-owned caption companies who have offered to provide quality, cost-effective captioning services. When video programmers choose not to take positive efforts to use cost-effective very small business providers, to expand captioning, they should not be entitled to undue burden exemptions. We would urge the following administrative regulations be implemented by the FCC regarding very small business providers.

1. Positive efforts shall be made by video programmers to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Video programmers utilizing federal funds through third party captioning contractors to maintain or expand captioning of their video programming must ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable. A finding that video programmers have not taken positive efforts to utilize such entities, will be prima facie evidence to deny undue burden exemptions to video programmers. Further, a video programmer which does not utilize the above-mentioned entities to provide 25% of their captioning requirements under the proposed transition requirements will be deemed to be not in compliance with the administrative regulations.

We strongly believe such administrative measures by the FCC are necessary.

In principle, we do not believe that private businesses should be told whom to do their business with. However, we believe the public interest demands your intervention to stipulate in, administrative regulation, that very small businesses, minority-owned firms,

and women-owned business enterprises be used for some base percentage of a large video programmer's captioning requirement.

We are not requesting set-asides, since such very small businesses must demonstrate comparable price and quality. We are stating that it is imperative that a requirement for large video programmers to utilize very small business caption providers, minority owned businesses, and women-owned business be codified in your administrative regulations on closed captioning. This is essential for the supply of talented closed captioners to increase, and for price efficiency and reasonable pricing to be achieved in this industry. The FCC makes exceptional provision for very small businesses, including minority and women-owned businesses to participate and receive awards in its spectrum auctions, and therefore a precedent exists for an FCC requirement on video programmers to use very small businesses when contracting for closed captioning services.

Most consumers of closed captioning are weary of the arguments from large video programmers about the cost of captioning, and do not understand why they must wait eight years for full accessibility through captioning, when the Television Decoder Circuitry Act of 1990 required only a three year implementation for compliance. The closed captioning market must become a price efficient market through fair competition, with demand for services from the small business providers who constitute the bulk of service providers, being ensured by law. As we asserted above, and would testify to under compulsory process, there is no assurance that very small businesses, minority and women-owned businesses, will be used by larger programmers, unless required by FCC Administrative Regulations to provide captioning services, even when price and

quality are not issues, and in the above-noted case in a federal bid competition for closed captioning, even when the intent of the awarding agency is to promote competition. We would urge your investigation into allegations of non-affirmative actions by video programmers as noted above, who seek to have their programming captioned with federal dollars, and request the FCC provide information regarding non-affirmative actions by video programmers to any affected agency procuring closed captioning services, particularly where such actions are inconsistent with the agency's procurement and/or award guidelines as noted in their General Administrative Regulations, regarding positive efforts to use very small businesses, minority-owned firms, and women's business enterprises, and compliance with FCC administrative guidelines on the use of very small businesses that you may issue. Further, we urge the FCC to investigate reports of alleged discrimination against very small businesses, minority-owned firms, and women-owned businesses through your Bureau of Competition, and to coordinate your investigation with other government agencies concerned with consumer protection and antitrust issues. Specific administrative regulations on the above by the FCC are essential now, along with coordinating activities with other agencies, in order to protect the consumer by ensuring the development of a price-efficient market, and thereby achieve more closed captioning for the consumer on the fastest practical timetable. Without your specific regulations to ensure specific percentage requirements for using very small businesses, minority-owned firms, and women business enterprises, (provided they have comparable quality and price), large video programmers may be able to delay implementation of closed captioning accessibility using cost as their excuse. This will only invite a much broader

examination of the efficacy of FCC Administrative Regulations by frustrated consumers through their Congressional constituent channels.

Also, in our comments submitted to the FCC on February 24, we urged the FCC to require video programmers to disclose the bid price they have received from closed captioning agencies, if and when they (video programmers) file undue burden exemption requests. We anticipate addressing this issue at greater length in additional comments on your proposed Rulemaking on public Information and Inspection of Records.

1. We request that exemption 4 status (confidential information) not be granted on pricing for captioning services quoted to video programmers by captioning vendors, and submitted to the FCC as the basis for an undue burden exemption. We believe requiring disclosure of such information is essential in determining whether the pricing is reasonable, or predatory in nature, and since pricing information may be a key component in the granting of undue burden exemptions, it must be disclosed as a necessary link in a chain of evidence that will resolve a public interest issue. That issue is whether the cost proposed to a video programmer is reasonable, subsidized, or predatory, and consistent with the captioning providers public rate sheet or customary pricing practices based on operational costs. Failure to disclose such information will have a material bearing on the ability of the FCC to effectively evaluate the efficacy of cost proposals, with public input, used by video programmers as the basis of undue burden exemptions they are seeking.

From our operational experience, certain caption providers will go to extraordinary lengths using exemption 4 under FOIA to prevent release of cost data, up to and including the threat of legal action against the public agency for disclosing such data. If video programmers are seeking undue burden exemptions to delay or postpone compliance with the FCC captioning requirements, they must be prepared to substantiate their claims with cost data subject to public verification with comparative market data.

We urge the FCC to implement the above-noted proposals. Failure to do so may result in frustration of the FCC's efforts to promote competition and a competitive market place for captioning services, delaying accessibility for the consumer through closed captioning, as certain caption companies with a monopoly position in the captioning industry, and certain large video programmers develop mutually favorable pricing and operational strategies to reestablish their favored positions. The notion that "high cost produces high quality" suits a very small number of large captioning companies with higher cost structures, and apparently some networks who may use the costing structure as the basis for undue burden exemption claims, deferring the implementation of more closed captioning, on the basis of price.

Perhaps shareholders, in time, will question the reasonableness of such procurement policies by their management, but until such time, your specific intervention in the public interest is necessary.

Without specific regulations regarding the use of very small businesses, minority firms, and woman-owned businesses as noted above, the closed captioning industry will not

develop into a price efficient marketplace, with fair and open competition, to the detriment of the consumer. Without demand for their services, smaller entities will never mature into larger organizations, able to attract stenocaptioners into this emerging field, and the Deaf and hard of hearing consumer will not obtain the level of video accessibility Congress intended as undue burden exemptions are used aggressively by video programmers to defer the implementation of closed captioning. As your Chairman Reed Hundt recently stated, discussing the FCC's agenda, "As we get a grasp of what communications technology can do in the next millennium to improve all dimensions of life, let's maximize our potential economic and social gains by doing all we can not to let the urge to monopolize kill communications competition again. (Quoting Mark Twain) As Mark Twain said, 'history may not repeat itself but it does occasionally rhyme.' It's a fin-de-siecle monopoly couplet that Congress absolutely does not want us to write in our rules."